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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2015

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Ex parte S.C.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS

(In re: S.C.

v.

DeKalb County Department of Human Resources)

(DeKalb Juvenile Court, JU-13-10.02;
Court of Civil Appeals, 2140248)

STUART, Justice.

WRIT DENIED. NO OPINION.

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Bolin, Parker, Shaw, Main, Wise, and Bryan, JJ., concur.

Stuart, J., concurs specially.

Moore, C.J., and Murdock, J., dissent.

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STUART, Justice (concurring specially).

The DeKalb Juvenile Court terminated the parental rights of S.C., the father, to his minor child. The Court of Civil Appeals affirmed the juvenile court's judgment, without an opinion. S.C. v. DeKalb Cnty. Dep't of Human Res. (No. 2140248, July 24, 2015), ___ So. 3d ___ (Ala. Civ. App. 2015) (table). The father petitioned this Court for certiorari review of the Court of Civil Appeals' decision, arguing that the record did not contain clear and convincing evidence of the child's dependency so as to support the termination of his parental rights.

"This court's standard of appellate review of judgments terminating parental rights is well settled. A juvenile court's factual findings, based on ore tenus evidence, in a judgment terminating parental rights are presumed to be correct and will not be disturbed unless they are plainly and palpably wrong. See F.I. v. State Dep't of Human Res., 975 So. 2d 969, 972 (Ala. Civ. App. 2007). Additionally, we will reverse a juvenile court's judgment terminating parental rights if the record shows that the judgment is not supported by clear and convincing evidence. F.I., 975 So. 2d at 972. 'Clear and convincing' evidence has been defined as "'[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion.'" J.A. v. Etowah County Dep't of Human Res., 12 So. 3d 1245, 1252 (Ala. Civ. App. 2009) (quoting L.M. v. D.D.F., 840

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So. 2d 171, 179 (Ala. Civ. App. 2002) (quoting in turn § 6-11-20(b)(4), Ala. Code 1975)). "Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt." Southeast Envtl. Infrastructures, L.L.C. v. Rivers, 12 So. 3d 32, 48 (Ala. 2008) (quoting § 6-11-20(b)(4), Ala. Code 1975).

"Our juvenile courts use a two-pronged test to determine whether to terminate parental rights:

"A juvenile court is required to apply a two-pronged test in determining whether to terminate parental rights: (1) clear and convincing evidence must support a finding that the child is dependent; and (2) the court must properly consider and reject all viable alternatives to a termination of parental rights.'

B.M. v. State, 895 So. 2d 319, 331 (Ala. Civ. App. 2004) (citing Ex parte Beasley, 564 So. 2d 950, 954 (Ala. 1990))."

C.S.B. v. State Dep't of Human Res., 26 So. 3d 426, 429-30 (Ala. Civ. App. 2009).

Section 12-15-319, Ala. Code 1975, provides:

"(a) If the juvenile court finds from clear and convincing evidence, competent, material, and relevant in nature, that the parents of a child are unable or unwilling to discharge their responsibilities to and for the child, or that the conduct or condition of the parents renders them unable to properly care for the child and that the conduct or condition is unlikely to change in the foreseeable future, it may terminate the parental rights of the parents. In determining whether or not

the parents are unable or unwilling to discharge their responsibilities to and for the child and to terminate the parental rights, the juvenile court shall consider the following factors including, but not limited to, the following:

"....

"(2) Emotional illness, mental illness, or mental deficiency of the parent, or excessive use of alcohol or controlled substances, of a duration or nature as to render the parent unable to care for needs of the child.

"....

"(7) That reasonable efforts by the Department of Human Resources or licensed public or private child care agencies leading toward the rehabilitation of the parents have failed.

"....

"(9) Failure by the parents to provide for the material needs of the child or to pay a reasonable portion of support of the child, where the parent is able to do so.

"....

"(12) Lack of effort by the parent to adjust his or her circumstances to meet the needs of the child in accordance with agreements reached, including agreements reached with local departments of human resources or licensed child-placing agencies, in an administrative review or a judicial review."

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Mindful of the foregoing principles and that every parent has a prima facie right to the custody of his or her child and that that right may be overcome only by clear and convincing evidence that the termination of parental rights is in the best interests of the child, see D.A. v. Calhoun Cnty. Dep't of Human Res., 892 So. 2d 963 (Ala. Civ. App. 2004), I concur with the majority that a review of the facts, as presented by the father in his petition for certiorari review, establishes that the juvenile court's judgment terminating the father's parental rights is supported by clear and convincing evidence.

The facts before this Court indicate that, although the father had secured stable housing for him and the child and had consistently visited with the child, who was in foster care, during the pendency of this case, the father is otherwise currently unable to discharge his parental duties properly and that his inability to properly care for the child will likely persist in the foreseeable future. After the child entered the care of the DeKalb County Department of Human Resources ("DHR"), the father met with a DHR worker and the following goals were set for the father to satisfy before he could be reunited with the child:

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1. The father would obtain safe and stable housing;
2. The father would obtain employment;
3. The father would submit to a psychological evaluation;
4. The father would remain bonded with the child through visitation;
5. The father would have transportation;
6. The father would submit to "random color-code drug and alcohol monitoring";
7. The father would submit to a substance-abuse assessment at The Bridge, a substance-abuse center; and
8. The father would complete counseling and parenting classes.

The facts, as presented by the father, indicate that at the time of the hearing the father had obtained stable housing; that the father had had periodic employment but was at that time unemployed with no pending employment opportunity; that the father had completed a psychological evaluation; that the father had fairly consistently visited with the child; that the father had obtained transportation but that it was unreliable; that the father had not consistently submitted to drug and alcohol monitoring; that the father had not submitted to a substance-abuse assessment

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at The Bridge; that the father had been arrested for third-degree criminal mischief, possession of a controlled substance, and possession of drug paraphernalia since DHR had become involved with the family; and that the father had not engaged in, much less completed, counseling or parenting classes. The father did testify that he loved his child and that he wanted to be a father again, but he does not include in his statement of facts testimony indicating that he understood the needs of the child beyond the need for housing or that he understood the steps he needed to take to improve his parenting skills to be able to personally care for the child.

The facts, as presented by the father, establish that the juvenile court's judgment to terminate his parental rights is not, as the dissent urges, the result of the father's poverty. The judgment is based on clear and convincing evidence that, with the exception of attaining housing, the father did not work toward reunification with the child by changing his conduct and circumstances and by developing his parenting skills so that he could provide for the child.

Rule 39(a), Ala. R. App. P., provides:

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"Certiorari review is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons for the issuance of the writ."

Because the facts, as presented by the father, demonstrate that the juvenile court's judgment to terminate the father's parental rights is supported by clear and convincing evidence, I conclude that the father has not pleaded a "special and important reason" for the issuance of the writ, and I concur with the majority's decision to deny the father's petition for a writ of certiorari.

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MOORE, Chief Justice (dissenting).

I respectfully dissent from the denial of the petition for a writ of certiorari filed by S.C. ("the father"). I would grant the petition because, in my opinion, the father's verified statement of facts does not support the finding that the father's minor child, a daughter, was dependent. Rather, the facts suggest that the DeKalb Juvenile Court ("the juvenile court") found the child to be dependent because of the father's living conditions, which are a result of his poverty. I would grant the petition to examine the record for evidence of dependency and to ensure that the State is not separating this child from her natural parent because of conditions common among the poor and underprivileged.

Having received a report about the child's living conditions, the DeKalb County Department of Human Resources ("DHR") became involved with the family on January 9, 2013.¹ Beth McDaniel, a DHR caseworker, testified that, when she visited the residence in which the child was living with the father and the mother she found the mother, the father, and the child living in a 10' x 10' block building with dirt

¹The mother is not a party to this proceeding.

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floors, a poorly kept roof, and no electricity or running water.² She testified that, although the building had a wood heater, the wood stacked outside the building was wet. She stated that two mattresses were lying on the dirt floor and that clothes and other belongings were stacked throughout the residence, including on the mattresses and on the wood heater.

The child was placed in foster care. DHR held an individualized-service-plan ("ISP") meeting on January 21, 2013, which both the father and the mother attended. DHR also held several subsequent ISP meetings. These meetings established, among other things, that, as part of the ISP, the father and the mother should obtain safe and stable housing and employment, should undergo psychological evaluations and drug and alcohol monitoring, should maintain visitation with the child while she was in foster care, should submit to a substance-abuse assessment, and should complete counseling and parenting classes; that the child should be examined for sexual abuse; and that the child should remain in a foster

²The father's petition refers to testimony from different hearings. It is unclear from the petition how many hearings were held and at which hearings the testimony occurred.

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home. At some point during these proceedings, the mother and the father separated.

McDaniel testified that, after the father and the mother moved out of their residence and separated, the father began living in a house owned by his grandmother, who no longer resided in the house. The child would visit the father at this house. The father testified that he had been living in this house for approximately one year. The house was safe and had three bedrooms, a new roof, electricity, running water, and multiple sources of heat, including a gas heater, a wood heater, and electric heat. McDaniel testified that the living conditions in the house were adequate.

DHR referred the father to counseling with Michael Smith, a licensed counselor who had contracted with DHR to provide counseling services for DHR. Smith testified that he met with the father for an initial session on November 5, 2013, and that, during the session, the father communicated with him but blamed others for his troubles rather than accepting personal responsibility. Smith testified that he scheduled a second session with the father for November 24, 2013, but that the father did not appear for the session. Smith testified that he

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was unable to reach the father by telephone and that he had no further contact with the father after the first session. Smith stated that the father did not contact him about rescheduling; that his clients have access to his cell-phone number and can call, text, or e-mail him; and that a client's lack of a telephone would interfere with the client's ability to communicate with him. The father lacked a telephone. Smith admitted that he did not send any letters to the father and that he informs clients during their initial session that it is their responsibility to contact him if they miss a session. Smith contacted the father's caseworker at DHR to advise her that the father had missed a session.

The father testified that he was unemployed and that he had difficulty finding a job because he dropped out of school in the 11th grade and never earned a General Equivalency Diploma (GED). He testified that he had held several jobs since DHR became involved with his child. He claimed that he lost jobs because he missed work to attend hearings in this case. His latest job was, he says, at Bass Tree Service, but he said he lost that job after his employer died in a work-related accident. The father says he worked for two

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months at a heating, air, and tree-service business but was laid off with other workers. Before that job, he says, he worked for Trees Unlimited for approximately two months but lost that job because he missed work to attend hearings in this case. The father also testified that he worked odd jobs and sold scrap metal and had "walked all over" for two months trying to obtain employment.

According to the father, there is no evidence indicating that the child was ever sexually abused. The father submitted to a psychological evaluation by Dr. David Wilson at Gadsden Psychological Services, LLC, on June 25, 2013. Dr. Wilson determined that the father had good verbal skills, that he communicated adequately, and that he possessed good nonverbal skills. Dr. Wilson's only concern was with the father's short-term or working memory. Wilson testified that the father "reads pretty well in the average range." He also testified that the father was capable of raising the child. Dr. Wilson indicated, however, that the father needed to accept responsibility for his actions and undergo counseling.

While the child was in foster care, DHR allowed the father and the mother to have supervised visitation with the

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child for two hours each Friday. McDaniel testified that, although the mother was inconsistent with her visitation, the father consistently visited the child. The father recently visited the child on her birthday, hung balloons for her birthday party, and bought her a gift.

The father alleges that the child struggles in her foster homes and is now in her fifth foster home. McDaniel testified that the first foster home was not a good fit for the child, that the child was removed from the second foster home because of allegations of sexual abuse by the foster parent, and that the third foster home was merely a temporary placement while the allegations of sexual abuse by the previous foster parent were investigated. After the investigation revealed no sexual abuse, the child was returned to the second foster home until those foster parents moved out of state and chose to no longer be foster parents. The child was removed from her fourth foster home because the foster parents could not deal with her behavior. The child was in her fifth foster home at the time of the termination hearing.

The father testified that he had an operational vehicle during the pendency of this case. Although his truck allegedly

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was broken down on the date of one hearing, he stated that he had walked approximately 30 miles to attend the hearing.

In August 2013 the father was arrested for criminal mischief in the third degree when he broke a window in his grandmother's house. In 2014 he was arrested for unlawful possession of a controlled substance and unlawful possession of drug paraphernalia. DHR asked him to undergo drug assessments at a substance-abuse center and to submit to random alcohol and drug screening. DHR had no evidence indicating that the father tested positive for drugs at the time of his arrests. The father denies the drug-related charges and claims he was merely riding in a vehicle with someone who was in possession of drugs. The father alleges that the drugs belonged to the owner of the vehicle and that the father did not know the drugs were in the vehicle. The father testified that he has not been arrested for drugs since 2014. McDaniel testified that, although the father did not fully comply with the order that he submit to alcohol and drug screening, he was in compliance with that order at the time of the termination hearing. The father participates in a drug-rehabilitation organization called Addicts for Christ.

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McDaniel testified that the father never tested positive on a DHR drug screen.

The father testified that he loves his daughter with all of his heart and wants to be a father to her again. He says the child was placed in foster care because of a housing issue, but he now has adequate housing. The father testified that he feels as if he has been jumping through hoops but getting nowhere. I do not believe that Rule 39, Ala. R. App. P., should serve as another hoop to nowhere. I would issue the writ to evaluate the facts and merits of the father's case.